BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUSAN B. AWAD	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,037,459
	)	
U.S.D. NO. 512	)	
Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 26, 2008, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) concluded there was insufficient evidence to find that claimant's back pain was caused by her knee injury and denied her request for medical treatment of her low back.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 25, 2008, Preliminary Hearing and the exhibits, and the transcript of the December 19, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends that the evidence shows that her lumbar/sacroiliac pain was the result of her altered gait after the work-related injury to her right knee. As a result, claimant argues that her low back pain arose out of and in the course of her employment and she is entitled to medical treatment for the same.

Respondent asserts that the ALJ did not determine whether claimant's injury arose out of and in the course of her employment but, instead, determined whether claimant's lower left back pain is a direct and natural consequence of the work-related injury to claimant's right knee. Respondent argues that the Board lacks jurisdiction of this appeal under K.S.A. 44-534a because preliminary orders denying medical treatment are not

reviewable by the Board. If the Board finds jurisdiction to review this appeal, respondent argues that claimant's request for medical treatment should be denied because she failed to meet her burden of proving that her need for medical treatment to her left lower back resulted from her original work-related injury.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issue decided by the ALJ?

(2) Is claimant's left low back condition a direct and natural consequence of her work-related right knee injury so as to have arisen out of and in the course of her employment?

FINDINGS OF FACT

Claimant, a teacher employed by respondent, injured her right knee on September 5, 2007, when she tripped on a crack in the parking lot of the school. The day before this injury, claimant had been seen by her personal physician, Dr. Halla Moussa, with complaints of low back pain that radiated into her right leg. Dr. Moussa referred claimant to Dr. Daniel Bruning for pain management. Dr. Bruning's report of September 13, 2007, indicated that claimant's chief complaint was bilateral low back pain and right posterior leg radiating pain with numbness to her knee on the right. Claimant also told Dr. Bruning that she noticed a slight left groin pain when she turned over in bed. A lumbar epidural steroid injection was performed on September 13, 2007, and again on September 28, 2007. The report of the September 28 injection indicated that claimant only had a 50 percent improvement since her last epidural steroid injection.[1]

At a preliminary hearing held December 19, 2007, claimant testified that the treatment she received for her low back in September 2007 was not for a work related condition, that she had a history of low back problems, and that her low back condition was a "progressive problem from something I must have done at home or somewhere."[2]

Because of those non-work related problems, claimant did not initially recognize her right knee problems as being a result of her trip in the parking lot. Accordingly, treatment for that injury, a torn anterior cruciate ligament, was delayed. After a preliminary hearing held in December 2007, claimant began seeing Dr. Lowry Jones, who was authorized to treat her right knee. Surgery was performed on her right knee on February 22, 2008.

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[1] P.H. Trans. (Dec. 19, 2007), Cl. Ex. 1 at 10.

[2] *Id.* at 7.

Claimant testified that after the injury on September 5, 2007, she was limping badly, which caused her problems in her left lower back. She claimed her previous back problems were the result of a pinched nerve on the right side of her low back. She said when she spent time on her couch recovering from her knee surgery, she did not have much back pain, but as soon as she started moving around again, the pain returned.[3] She testified she told Dr. Jones about her low back problems when he first began treating her. On March 24, 2008, claimant complained to Dr. Jones of low back pain "again" after she stopped using crutches.[4] On March 28, claimant complained to Dr. Moussa of "low back pain more [on the left] side."[5] On April 21, 2008, claimant again complained to Dr. Jones of "SI joint pain."[6] Dr. Jones's medical record of that date also indicates that claimant indicated that she had "previous right sided back and leg pain treated in September. Pain resolved. [Left] sided pain started 1 month ago."[7] Dr. Jones diagnosed claimant with "SI joint pain secondary to limping."[8]

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-555c(a) states in part:

> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

However, the Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

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[3] P.H. Trans. (June 25, 2008) at 13.

[4] *Id.*, Cl. Ex. 1 at 4.

[5] *Id.*, Cl. Ex. 1 at 3.

[6] *Id.*, Cl. Ex. 1 at 5.

[7] *Id.*

[8] *Id.*

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[9]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

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[9] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[10] K.S.A. 2007 Supp. 44-501(a).

[11] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

> the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[13] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[14] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[15]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[16] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to all new and distinct accidental injuries. In *Stockman,*[17] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[12] *Id.* at 278.

[13] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[14] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[15] *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

[16] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[17] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

In *Gillig,*[18] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[19] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[20]

In *Logsdon*,[21] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,[22] the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

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[18] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[19] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[20] *Id.* at 728.

[21] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[22] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[23] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[24]

ANALYSIS

The issue presented in this appeal is whether claimant aggravated her preexisting low back condition as a direct and natural consequence of her work-related right knee injury. The Board has jurisdiction of this issue on an appeal from a preliminary hearing because it gives rise to a disputed issue of whether the back injury arose out of and in the course of claimant's employment with respondent.

Based upon the record presented to date, this Board Member finds that claimant's work-related knee injury resulted in a limp which, in turn, has aggravated her preexisting low back condition. While claimant was off work and recuperating from her knee surgery, her low back symptoms subsided. However, after she began ambulating without the aid of crutches, she walked with a limp and this caused her back pain to return. Claimant's treating physician, Dr. Jones, opined that her limp was the cause of her back sprain and strain. Based on the record presented to date, it is more probable than not that claimant's limp has resulted in at least a temporary aggravation of her low back symptoms.

CONCLUSION

(1) The Board has jurisdiction to review the disputed issue.

(2) Claimant's present low back symptoms are a natural consequence of her work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 26, 2008, is reversed, and this matter is remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

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[23] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[24] K.S.A. 2007 Supp. 44-555c(k).

Dated this _____ day of August, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge